Time is of the Essence – How Essential is it?

by ***Ir. Oon Chee Kheng***

ANYONE who has ever read an agreement, any type of agreement, would have more often than not come across a provision contained within which reads something like this:

> *"Time wherever mentioned herein shall be of the essence."*

Contrary to common belief, this expression carries some defined and specific meaning. The phrase certainly does not mean that in the absence of such a provision, time is not important. The precise meaning of the phrase, and how it operates in practice, should thus be appreciated. In this, I can do no better than quote from the judgement of Lord Justice Mustill (then of the English Court of Appeal) who said in the case of *Lombard North Central Plc v. Butterworth* [1987] 1 All ER 267 the following on pp. 271 – 272:

> *"A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach. It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may* ***elect to terminate*** *and recover damages in respect of the promisor's outstanding obligations,* ***without regard to the magnitude of the breach****." (emphasis added)*

What the learned judge has stated has to be studied carefully. He specifically referred to the provision of time being of the essence "in relation to a particular contractual term". The draftsmen of contract documents have more often than not drafted a ***general*** time of the essence clause. In this respect, the provision cuts both ways.

This also means that, if the contractor delays in completing the works or a defined section of the works, even by a day or two and however insignificant the delay, the employer is entitled to terminate the contract. Furthermore, and from the contractor's perspective, if the employer delays in effecting payment when it falls due, even by a day or two and however insignificant the delay, then the contractor is entitled to terminate the contract.

Clearly this could not have been intended by both parties. Indeed, from a policy perspective, this is undesirable.

The above pronouncement of Lord Justice Mustill can be compared with the provisions of section 56(1) of our Contracts Act 1950:

> *"When a party to a contract promises to do a certain thing at or before a specified time, …, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed,* ***becomes voidable at the option of the promisee****, if the intention of the parties was that* ***time should be of the essence of the contract****." (emphasis supplied)*

The Malaysian position is therefore identical. The next issue that needs to be considered is this. When is time of the essence?

Guidance on this can be seen from the judgment of Mr Justice Gill in *Tan Ah Kian v. Haji Hasnan* [1962] MLJ 400, where the learned judge identified the following three situations when time would be of the essence:

(i) the parties expressly state in the contract that it shall be so;

(ii) where it was not originally stated to be of the essence but it was subsequently made so by one party giving reasonable notice to the other who has failed to perform the contract with sufficient promptitude; or

(iii) where from the nature of the contract or of its subject matter time must be taken to be of the essence.

A possible fourth situation would be to ascertain from the real intention of the contracting parties if time is of the essence.

How about construction contracts? It is often that Letters of Award have carried this provision even though all standard construction contracts either local or international (with the exception of the latest JKR 203 series of contracts, 2007 Edition) have not. In this regard, I can do no better than reproduce the following passage in P C Markanda, *Building and Engineering Contracts – Law and Practice*, 2nd Edition (2007) on p. 628:

> *"Even where the parties have expressly provided that time is of the essence of the contract* ***such provision shall have to be read along with the other provisions of the contract*** *… if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such* ***clauses would be construed as <u>rendering ineffective</u> the express provision relating to the time being of the essence of the contract****." (emphasis supplied)*

Engineers who draft letters of award should thus bear the discussion above in mind. Any such attempt is to be resisted lest the letter of award drafted is made a "laughing stock"! ■